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July 26, 1995

URGENT LITIGATION MATTER

Via Federal Express

Peter Raack, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region IV
345 Courtland Street, NE
Atlanta, GA 30365

Re: **Carrier Air Conditioning Site; Collierville, Tennessee**

Dear Mr. Raack:

This letter is further to our conference of Friday, July 14, 1995, in which you participated by telephone, and in which EPA's Remedial Project Manager, Ms. Elizabeth Brown, participated in person. We were joined in person by Ralph Gibson, Esq., counsel for Norfolk Southern Railway Co. ("the railroad"), myself as Carrier's environmental counsel, Mr. Craig Wise of En-Safe, the response action contractor at the site, Mr. Carl Krull, one of Carrier's environmental engineers, and Roscoe Field, Esq., and Lorna McClusky, Esq., Carrier's real estate counsel.

Please make this letter and accompanying materials a part of the administrative record for this site, as it supports Carrier's claims of *force majeure* under the Unilateral Administrative Order (UAO). These *force majeure* claims arise from the filing of the railroad's lawsuit and amended lawsuit seeking access to perform work at this Superfund site without regard for the

restrictions and requirements of the ongoing remedial work performed by Carrier under the UAO, but which may interfere materially with that effort.

As you recall, the purpose of the conference was to review the environmental compliance issues raised by the railroad's proposed use of a spur track to unload 300,000 tons of crushed limestone for the first of several major road building projects near the Carrier plant. The announced road projects in Collierville include not only the current extension of Nonconnah Boulevard as a major artery south of the plant, but also the extension of Winchester Road in the near future (possibly across the southern portion of the Carrier plant property), and the extension of Highway 72 as a four-lane road between Collierville and Cornith. These additional projects strongly suggest that the proposed unloading work may, in fact, continue for many years at the Collierville site, as this is the only railroad spur off the main line of the railroad in this vicinity. Thus, the railroad is proposing significant work at this site which may persist for much and perhaps most of the duration of the remedial work required under the Unilateral Administrative Order (UAO) for this site.

Consequently, as we discussed during this call without objection from railroad counsel, it is essential that EPA and Carrier have an enforceable legal instrument with the railroad and Hill Bros. Construction Company, the railroad's customer for this unloading work. This should be an instrument memorializing the engineering, insurance, and other safeguards required to prevent

interference with the ongoing remedial work under the UAO. In Carrier's view, the most reasonable way to accomplish the objective is to have the railroad and Hill Bros. made parties by consent to the UAO, in an addendum which precisely defines the scope of the allowed work, its exact location, engineering design and specifications, EPA's access to it, and sampling protocols. Likewise, the AO addendum must define the railroad's and Hill Bros.' insurance and indemnity obligations to EPA and Carrier in the event these parties' activities interfere with the remediation, damage or destroy the monitoring wells or remedial systems or otherwise cause contamination -- now safely contained and under treatment -- to spread.

It is unfortunate that the railroad filed its lawsuit before seeking any such conference with EPA and Carrier about this site. The site had been proposed for the National Priority List (NPL) in 1988, listed in 1990, and at which extensive sampling and remedial activities have been underway since 1986. Carrier had provided copies of the UAO, Record of Decision (ROD), and Statement of Work (SOW) to the railroad in early June, so there was no lack of actual notice about it; indeed, notice of the UAO had been recorded in the land records of the site in early 1993. Consequently, the railroad was on formal and actual notice of the UAO before the conference, yet chose to litigate in state court without EPA's participation and without consideration of these complex environmental issues. Indeed, on July 12, just two days before the conference, the railroad filed an amended complaint, a copy of which is also enclosed for the

administrative record as Exhibit 1. Please note that Carrier vigorously contests the allegations in that amended complaint, and believes that some of the factual assertions contained in it are false.

Despite the railroad's litigious approach to this matter, Carrier has made clear that it remains willing to allow the unloading operation to occur provided the indemnification, insurance, and environmental issues concerning this site are properly addressed. Carrier remains willing to do so, provided that EPA concurs and that adequate enforceable measures are undertaken by the railroad and Hill Bros. to assure that no interference with the ongoing remedial work occurs and that no environmental violation occurs.

In order to put Carrier's specific concerns about the railroad's proposal in context, Part I of this letter reviews the events which have resulted in the current *force majeure* situation. Carrier must comply with the rigorous provisions of the UAO, and yet without regard to the UAO, is being sued by the railroad seeking to control activities on part of the site which EPA wants remedied. Carrier believes that the filing of the railroad's amended complaint on July 12 is a further basis for Carrier's claim of *force majeure* under ¶ XXII B. of the UAO.

Part II of this letter presents the specific engineering, legal, and policy issues raised during our conference, listing the specific documents we are requesting from the railroad and Hill Bros. to support the verbal assurances made by the railroad's counsel and engineering personnel to the Remedial Project Manager and to Carrier, both before and during that conference.

Part III of this letter explains the provisions that must be included in an administrative order between EPA, the railroad and Hill Bros. As is set forth more fully below, Hill Bros.' trespass in April, when it cleared two acres of trees on Carrier's property, and possible questions about its current compliance with stormwater and oil pollution requirements at its concrete batch plant at the southern boundary of Carrier's property underscore the need for binding compliance commitments from the railroad and Hill Bros. These commitments should be memorialized in an AO, so that both the railroad and Hill Bros. will have the same legal incentives as Carrier to conduct their activities without interfering with Carrier's remediation under the UAO. I have enclosed photographs of these activities, documenting the questionable secondary containment measures for oil and stormwater, as well as the two acres which were cleared without Carrier's permission.

I. Factual Background.

A. Site Boundaries.

Carrier purchased the Collierville plant property from the City of Collierville in December 1987. Prior to that time, the City had owned the property; Carrier had been the tenant since around 1970. The City's prior ownership status is well known to EPA; that is why EPA issued a special notice letter to **both** Carrier **and** the City in 1992 after the Record of Decision

(ROD) was signed. The City apparently had obtained the property for industrial development in the late 1960s, using industrial bond authority under state law.

As pointed out in my July 6, 1995, letter, the boundaries of the Carrier Air Conditioning site were set at the time of the site's placement on the National Priority List (NPL) in 1990. That listing, including the boundaries, was proposed in 1988. The railroad apparently chose not to comment on it then, however, or when the property was listed on the NPL in 1990. Neither did the railroad file any petition challenging the listing with the U.S. Court of Appeals for the District of Columbia Circuit, the exclusive venue for such challenges. The 90 day time period under §113(a) of CERCLA, 42 U.S.C. §9613(a), to file any such challenge has long since expired.

Thus, to the extent the railroad is contending, as it clearly does in this case, that the boundaries of Carrier's property and thus the site being remedied do not include the contested right of way between 50 and 100 feet from the rail line, that challenge is foreclosed by federal law. Indeed, even the railroad's counsel concedes that Carrier's title runs to the center of the track, but argues that the railroad has a right to come on the property to the width of 100 feet to the center line to use the spur track for this other purpose. Their alleged claim does not override the site boundaries defined in the NPL, and does not entitle the railroad and its customer, Hill Bros., to disregard or interfere with the work being performed under the UAO at this site,

requirements imposed under federal law, and which under the Supremacy Clause of the Constitution clearly override contrary requirements of state law.

In our discussions in the fall of 1992 concerning a possible consent decree at this site, Carrier noted its concerns about the broad definition of the "site" included in the proposed decree. Those discussions did not result in a consent decree, but rather with the suggestion by Carrier that EPA issue a UAO to Carrier to perform the cleanup, which Carrier would conduct. That UAO followed in February 1993. At that time Carrier specifically noted the problematic nature of the broad site definition in the UAO, a definition which extends even **beyond** the boundaries of the property owned by Carrier:

> "Site" shall mean the Carrier Air Conditioning Superfund Site, encompassing approximately 135 acres, located on Byhalia Road in Collierville, Shelby County, Tennessee, together with all areas to which hazardous substances released at this parcel have migrated and *all areas in close proximity to the contamination that are necessary for implementation of the Work*, as generally depicted on the map attached as Appendix 3.

February 11, 1993 Unilateral Administrative Order (UAO), ¶ III. U. (emphasis added). Thus, EPA's expansive definition of the site would appear to encompass the activities contemplated by the railroad even if the railroad were correct in its contentions about the property.[1/] The actual

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1/ In my March 10, 1993 letter for Carrier, pp. 2-3, responding to the UAO and following up our February 26, 1993 Atlanta meeting, I noted the expansive nature of this definition and the potential for problems which its elastic terms could create. As EPA has insisted on using this "velcro" site definition over Carrier's reservations, EPA needs either to amend the definition or to defend the work undertaken here from interference by the railroad and Hill Bros.

location now proposed for use by the railroad is "in close proximity to the contamination" and may be "necessary for implementation of the Work."

Unless EPA is prepared to significantly amend the site definition to delete the areas sought to be used by the railroad, its activities are on property of concern to EPA, regardless of who holds title to it or whether the railroad has somehow reserved some other right to it. The railroad's proposed activities, for reasons explained below, may interfere with the remediation and with environmental compliance at the Carrier site unless enforceable measures are undertaken by the railroad and its customer to prevent such problems from occurring. Consequently, these measures should be incorporated into an administrative order from EPA to the railroad and Hill Bros. construction company.

B. Negotiations Concerning Spur Line Usage.

As you and I have discussed from time to time over the last eight months, Carrier has been periodically approached by persons seeking to purchase or to use some portion of its property. One of these proposals concerns the possible use of the spur rail line for commercial purposes. These proposals have changed dramatically over time. In each instance, Carrier has reminded those making the proposal of the ongoing cleanup work under the UAO, and the need to assure that the proposed activities are compatible with the remediation.

In late January 1995, discussions occurred between the Mayor of Collierville, Northeast Mississippi Limestone, Inc., and Hill Bros. Construction Company, on the one hand, and Carrier on the other. At that time, the proposal included locating a batch concrete plant near the City of Collierville west well field, with possible encroachment on the north remediation system. A 2000 gallon diesel fuel tank was proposed to be located at the plant site; a shallow sediment pond was to be constructed there to collect run-off from truck washing operations. In addition, two to three acres were to be used for the storage and staging of washed gravel. The work was sought to be begun just two months later, in March 1995, and was to continue for at least three to four years.

A site map[2/], showing the location of this proposed work, is attached as Exhibit 2. Carrier expressed the view that the proposal was incompatible with the remediation work being undertaken at the site. Carrier also indicated the need for proper insurance and indemnity obligations to be satisfied. The City, of course, is well aware of the obligations contained in the UAO, as the City's attorney had been part of the negotiations leading up to the order and had previously been provided a copy.

2/ This map was drawn from a digitized aerial photograph; it is not a survey. Lines are shown at 25 feet, 75', and 100' from the rail line in order to help locate the proposed work, not to determine, one way or the other, the title dispute.

The proposal later changed to include only the unloading of stone at the site. Carrier indicated that it would allow such unloading work, provided proper indemnity and insurance undertakings were made. Carrier also noted its concerns about the effects the proposed work would have on Carrier's compliance with its stormwater permit, a permit which limits the discharge of suspended solids to Nonconnah Creek, which flows across the southern portion of Carrier's property. A copy of the Carrier permit is enclosed as Exhibit 3.

The City, reportedly for reasons of state law, proved unable to indemnify Carrier for the actions of the construction contractor which would use the stone, Hill Bros. Without such indemnification, Carrier was not willing to allow such work to proceed, particularly given its proximity to two costly monitoring wells and the nearby north remediation system and the water treatment system located at the City wells, a treatment system Carrier bought, paid for, and installed.

In late May, discussions began with the railroad, which was provided a copy of the UAO, the Record of Decision (ROD), and the Statement of Work (SOW) in early June during such talks. The railroad refused to indemnify Carrier for what the railroad's customer might do at Carrier's property. Carrier never refused the railroad the use of the railroad right-of-way, but the width of the right-of-way -- 50 feet or 100 feet -- came into question, when Carrier raised the indemnification issue given Carrier's own obligations under the UAO. It should be noted that

Carrier never demanded any money from the railroad, the City, or Hill Bros. to allow this operation to occur. Carrier was trying to accommodate the needs of the nearby road construction work as long as such accommodation did not impose costs on Carrier.

Related events in April 1995 gave Carrier strong reasons to insist on indemnification, insurance, and strict compliance with environmental restrictions. As shown by the enclosed correspondence with Hill Bros., that company mistakenly trespassed on Carrier's property and bulldozed two acres of trees. A copy of Hill Bros.' April 12, 1995 letter acknowledging this mistake and undertaking to restore the property to the extent possible is enclosed as Exhibit 4. Five photographs of the property, as cleared, are also enclosed. (Nos. 003N0070 - 74) When put together, these five pictures provide a panoramic view of the area of Carrier property mistakenly cleared. These color pictures are enclosed as Exhibits 5, 6, 7, 8, and 9. (Nos. 003N007, 73, 72, 71, 70. That tract of land had been densely covered with trees, but now would be suitable as a parking lot. These mistakes did not assure Carrier that Hill Bros. would carefully comply with operational restrictions near the spur line necessary to protect monitoring wells or to comply with stormwater and air pollution control requirements.

Photographs of the Hill Bros. cement plant at the southern boundary of Carrier's property provide further cause for concern. These photographs were taken on July 17, 1995, the Monday after our conference. As you will see, two of the photographs show what is apparently a diesel

storage tank. (Nos. 003N0078, 81) Exhibits 10 and 11. Although a low earth berm has been placed around it, apparently in an effort to comply with secondary containment requirements, the placement of a PVC drain pipe out of the berm will make this ineffective if secondary containment is ever actually needed to contain oil spillage. As you can see, the drain is uncapped.

Similarly, the truck washing operations depicted in two other photographs (Nos. 003N0079, 80) have a sediment pond to catch the runoff. The operations, including various drums or pails of liquid used in it, are shown in Exhibits 12 and 13. The pond is also shown in two additional photographs (Nos. 003N0084, 85) Exhibits 14 and 15. That pond, however, also has a visible PVC drain. Finally, a photograph showing the cement plant from the south, shows the piles of sand, gravel, and stone which would be a stormwater concern. Exhibit 16. (No. 003N0089)

Carrier does not know whether Hill Bros. has a stormwater permit from the State of Tennessee for this operation, but the approach to compliance shown by these pictures gives Carrier serious concern about what Hill Bros. and the railroad would do in practice on Carrier's property, particularly since the description and location of what activities are proposed for Carrier's property have changed a number of times. While Hill Bros. has indicated that it would place a silt fence near the operations on Carrier's property, there has been no indication of any

efforts by Hill Bros. or the railroad to obtain the necessary stormwater permit to address these unloading operations, nor any discussion of how to harmonize monitoring and sampling requirements, inspection requirements, and related obligations of the Hill Bros. permit if any with the existing Carrier permit.

Carrier has monitored incoming stormwater at the manhole near the railroad spur. A photograph (No. 003N0092) showing the location of this manhole, north of Carrier's plant, is attached as Exhibit 17[3/]. The most recent sample results show that influent stormwater from the access road[4/], spur area, and some area north of tracks has suspended solids as high as 250 mg/l, well above the Carrier permit limit for effluent of 200 mg/l. Carrier's recent control efforts -- costing around $15,000 -- helped reduce the sediment loading in the outfall below 200 mg/l.

3/ Attached as Exhibit 18 is a map that shows where the manhole in Exhibit 17 is located.

4/ Three additional photographs of the area near the rail spur and access road are enclosed Nos. 003N0091, 93, and 94 as Exhibits 19, 20 and 21. No. 91 shows the access road looking west towards the City wells. The North Remediation System is visible in the fenced area near the tree line; the City's water tank is visible at the end of the road, to the north (right) of the North Remediation System.

No. 94 is taken from the access road where the spur line crosses it looking west towards the City wells. The groundwater remediation system is visible. This is obviously much closer to the City wells. This is very close to the point the railroad now says it wishes to excavate, which would occur to the east and north (right) of the spur line.

No. 93 is taken from the spur line looking south toward the access road. The two small red flags by the track show where excavation would occur under the track for the conveyor. The area to the left of the track would also be graded.

Nonetheless, there is little margin for additional sediment in the influent stormwater, and none at all for noncompliance by Hill Bros. and the railroad with stormwater controls.

II. July 14, 1995 Conference.

Carrier appreciates EPA's participation at the July 14, 1995 conference. That conference followed an outdoor meeting in which we walked the portion of the property containing the railroad spur, and which is now proposed for the unloading operation. In the course of that outdoor meeting at the site and subsequently in the conference, verbal assurances were given by counsel for the railroad or the railroad's technical personnel on a number of points. The purpose of this portion of the letter is to memorialize the requests for written documentation on a number of these points, and to determine whether much or all of this dispute can be resolved without further resort to litigation.

A. Site Plan.

As a comparison of the enclosed January 1995 site plan proposed by Hill Bros. with the plan proposed by the railroad on July 14 will show[5/], there are very dramatic differences between what was first proposed to Carrier and what is now being proposed by the railroad. As was discussed at the outdoor meeting on July 14, the railroad's latest plan would have the excavation

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5/ The July 14 plan differs significantly in location of grading from that proposed by Hill Bros. in May.

work confined to the area north and east of the spur line and north of the access road. The purpose of the excavation work, as explained to us, would be to grade the land for better truck access, and to allow the installation of unloading machinery, including conveyors, so that railroad hopper cars could discharge the materials into a conveyor below the tracks, and the conveyor would raise the crushed stone onto an overhead conveyor and discharge into the dump trucks waiting next to the track. Trucks would back into this area so they would not have to turn around while loaded with stone. Water would be sprayed on the crushed stone at the loading point to keep down dust, and silt fences would be installed, and possibly other sediment control measures may be undertaken.

In Carrier's view, it is critical for the railroad to present a detailed map and drawings of the proposed work, materials precisely locating and defining that work so that its impacts on the remediation can be properly evaluated. At our outdoor meeting, and again in our conference, the Remedial Project Manager, Ms. Brown, indicated that such a detailed site plan was needed to help move this matter towards resolution. Until the railroad commits to and presents a specific site plan with a specific map location, Carrier cannot reasonably agree that the proposed work can occur without interfering with the remediation. Carrier does not see how EPA can reasonably agree to the railroad's proposal without detailed specifications about what that proposal is and exactly where construction work will occur. Earlier versions of the proposal for unloading stone and producing cement posed a substantial risk of interference with two

monitoring wells, as well with as the North Remediation System and possibly with the treatment systems at the City wells.

B. Monitoring Wells.

At the outdoor meeting, we pointed out monitoring wells MW47 and MW43 as wells which Carrier was concerned might be damaged by wayward vehicles. Both Carrier and EPA have had all too much experience with monitoring wells being accidentally destroyed by heavy equipment. Presumably the railroad has also; one of the requests made by the railroad technical personnel was for Carrier to paint the metal guards around the wells bright orange to help avoid such problems.

Carrier is willing to do so, but suggests that EPA consider authorizing the removal of these two wells to eliminate any chance of damage to the wells from the unloading operations. Neither well has been very productive of water for sampling purposes and there is no obvious need for their continued use.

By separate letter, Carrier's contractor, EnSafe, will seek permission for Carrier to remove these two wells, and will submit the data supporting that request. Carrier requests that EPA act expeditiously on this request, as it will eliminate some of the most obvious potential problems between the railroad and Carrier. Until EPA acts, however, Carrier must seek

protection of these wells from EPA, including clear and enforceable restrictions on any nearby truck traffic as well as clear and easily enforceable insurance and indemnity requirements so that if the wells are damaged and must be repaired or replaced, the responsible party, either the railroad or Hill Bros., will promptly pay for such repairs or replacements. As you know, these are stainless steel wells, precisely located and installed at great expense to Carrier in order to satisfy EPA requirements. Having expended these monies to satisfy EPA requirements, Carrier is entitled to EPA protection of the wells or to a decision allowing their permanent removal.

C. Environmental Impairment Liability (EIL) Insurance.

As we discussed at the outdoor meeting or the conference, the railroad has represented that it may have environmental impairment liability (EIL) insurance and that Hill Bros. is seeking to obtain such insurance in the sum of $1 million. Carrier and EPA should be provided copies of such policies so that the exclusions and terms can be reviewed as well as the policy limits. Carrier must assure that it has adequate coverage for any action by either the railroad or Hill Bros. which interferes with the remediation and/or causes the spreading of ground water contamination, which is now safely contained and under treatment. Obviously, this EIL coverage must address any actions by these parties or their invitees, whether or not negligent, since Superfund is a strict liability statute.

Carrier also needs to assure that there is coverage for new releases of hazardous substances or pollutants to the environment resulting from any actions by these parties or their invitees, since truck accidents or other mishaps can cause the release of oil and hazardous substances. Given Carrier's concerns about compliance with stormwater and secondary containment requirements south of Carrier's property, as demonstrated by the recent photographs submitted with this letter, this is not simply an academic concern to Carrier.

D. Comprehensive General Liability (CGL), Auto, and Workmen's Compensation Insurance Policies.

Carrier ordinarily requires contractors coming onto its site to have a comprehensive general liability (CGL) policy of $2 million, combined single limit, naming Carrier as an additional insured. Indeed, the spur agreement, though executed almost 20 years ago, requires $1.5 million in such coverage. As we discussed in our conference, Carrier and EPA need to review both the railroad's and Hill Bros.' policies to verify their limits and coverage. This issue is a concern to EPA, as you mentioned in our conference, since it is this insurance which helps protect EPA employees and contractors coming onto the site. Both EPA and Carrier should be named as additional insureds on these policies.

Similarly, one or both of the UAO and Carrier generally require contractors on Carrier's property to have statutory workmen's compensation and employer's liability ($500,000 per accident) policies and automobile liability insurance with a $1 million combined single limit

minimum. Other insurance requirements are shown on Exhibit 22. Again, both the railroad and Hill Bros. need to submit their policies so that the limits and coverage can be verified.

E. Indemnity Undertakings.

The railroad's counsel has indicated in his July 11 letter to you that the railroad would indemnify Carrier for the railroad's actions, but not for those of Hill Bros. The terms of the railroad's proposed indemnity have never been put in writing to determine for just what, in fact, the railroad would indemnify Carrier. If this offer is serious, Carrier needs to see the precise language the railroad is proposing.

The railroad has consistently refused to indemnify Carrier for the actions of Hill Bros., a position which is understandable given Hill Bros. recent unfortunate performance on Carrier's property and its comparatively small financial resources. This position is not reassuring to Carrier, however, and it should not be reassuring to EPA. Until the railroad is willing to indemnify EPA and Carrier fully -- or to provide other similar binding financial assurance -- against the actions of this railroad customer on Carrier's property, including actions resulting in possible environmental damage and costs, Carrier believes that it is entirely justified under the UAO in declining to allow this unloading operation to occur on its property.

Carrier, after all, has not asked for any payment from the railroad or Hill Bros. for this proposed use of Carrier's property, the railroad's repeated false allegations to the contrary notwithstanding. The railroad, by contrast, has claimed that it would receive gross revenues of several million dollars from this work over the life of the contract with Hill Bros. Under the circumstances, the equities clearly require the railroad, which stands to profit handsomely from the proposed work, to indemnify EPA and the property owner at financial and legal risk for actions by the railroad's customer on a Superfund site undergoing active remedial work.

F. Clean Water Act Permits.

Section 402(p) of the federal Clean Water Act, 33 U.S.C. § 1342(p) (1988), requires stormwater discharges associated with industrial operations to obtain National Pollutant Discharge Elimination System (NPDES) permits. EPA's regulations plainly include unloading operations such as that proposed here within the definition of "a discharge associated with industrial activity" required to secure such stormwater permits before discharging. Those unloading operations are not included in Carrier's stormwater permit, nor does Carrier's stormwater pollution prevention plan (SWP3) required by that permit include such operations. Moreover, since any effective SWP3 requires the permittee to be in control of the operation, it is difficult to see how Carrier could include that operation under its permit. The railroad after all, has filed the law suit here precisely in order to assure that Carrier does **not** have such control

over the unloading operations. Thus, the railroad and Hill Bros. need to take responsibility for the environmental compliance of these operations.

If the railroad has a stormwater permit addressing the proposed unloading operation, that permit and any underlying SWP3 needs to be provided to EPA and to Carrier so that both can coordinate efforts to assure continued compliance with discharge limitations to Nonconnah Creek. As indicated above, those limitations include limits on suspended solids which the influent water from the access road already has difficulty meeting. Likewise, if Hill Bros. has such a permit, that permit and the underlying SWP3 need to be provided to Carrier and to EPA. In both cases, the operational requirements of the permits and SWP3s need to be coordinated with Carrier's permit and SWP3 in order to assure continued compliance. As the pictures of Hill Bros. operations south of Carrier's property indicate, compliance with suspended solid limitations may be challenging for the proposed operations here.

Plainly, the railroad's state law property claim, even if meritorious, gives it no right to violate the Clean Water Act or to cause Carrier to do so. EPA should require full compliance by the railroad and Hill Bros. with these long-standing and well understood discharge limitation requirements as a condition for operating at this or any other site.

G. Air Permits.

Carrier is informed that the proposed unloading operation would ordinarily require an air pollution permit from the Memphis and Shelby County Health Department. Hill Bros. has recognized this requirement by securing an air pollution permit allowing it to construct its batch concrete plant south of Carrier's property. A copy of that permit is enclosed for your reference as Exhibit 23. As indicated in that permit, particulate emissions are expected from these operations; obviously they should also be expected from the unloading operations.

EPA and Carrier should be provided a copy of any air pollution permit from the railroad or Hill Bros. governing this operation, or an opinion letter from environmental counsel and a consultant's analysis demonstrating that no such permit is required here. If no permit has been issued yet, an analysis showing that none is needed should already have been prepared, or an application or applications should already have been filed by the railroad or Hill Bros. Carrier is informed that sixty to ninety days are ordinarily required to obtain such an air pollution permit after application. Given the sworn representations of urgency made to the court by the railroad, it would appear virtually certain that such an application had already been filed if the railroad and Hill Bros. were serious about pursuing this unloading project. As in the case of the NPDES permits, the railroad's claimed property rights give neither it nor Hill Bros. any exemption from the requirements of federal and state clean air laws and regulations.

Carrier is concerned about the particulate emissions from these operations for two reasons. First, the City wells, including the air stripping system, are not far to the west of the proposed operation. Carrier has not seen any analysis showing how much particulate might reach the air stripping system. The railroad's technical personnel have indicated that a dust suppression system would accompany the unloading operation, an assurance first given in the outdoor meeting on July 14. If so, that system should be reflected in the permit application, and emission rates should be specified sufficiently to analyze the effects of the operation, if any, on the air stripping system, and possibly on the North Remediation System, also near by. Depending on the amount of particulate emitted, filters may need to be installed, fan motor powers boosted, and other modifications made to the air stripping system. Of course the costs of these modifications, if needed, should be borne by the railroad and/or customers benefiting from such work.

Carrier is also concerned about the effects of these particulate emissions on its stormwater discharge compliance. Again, the permitted emission rates need to be analyzed, together with the likely dust fall and its impact on compliance by the stormwater discharge with effluent limitations affecting Nonconnah Creek.

H. Sampling Requirements.

At the outdoor meeting, the railroad's proposed sampling and analysis protocol was modified after discussions with the remedial project manager and with Carrier's consultant. Although no material delay resulted from these changes, these matters are ordinarily worked out in advance, and parties' rights to split samples and copies of sample results and analytic techniques are ordinarily spelled out in writing. Both the railroad and Hill Bros. should be required to comply with the same sampling protocols as Carrier in the future, unless EPA agrees in writing to the contrary, and to provide adequate advance notice to Carrier and to EPA of such sampling events so that split samples can be taken and EPA oversight contractors, as well as Carrier's contractor, can attend if they choose to do so. Similarly, requirements for data and record preservation concerning such sampling activities should be clearly spelled out for the railroad and Hill Bros., just as they are for Carrier. Fortunately, the samples taken by the railroad in this case reportedly do not have volatile organic compound (VOC) contamination, and only contain background levels of metals. In order to prevent questions from arising in the future, however, appropriate requirements should be in place to assure proper sampling and analytic methods, notice, sample and data preservation, and so forth.

I. Record Preservation.

Both the storm water discharge and the air pollution permits will require the railroad and/or Hill Bros. to keep and maintain certain records of their activities on the site. As part of any resolution of this dispute, these records should also be required to be kept under authority of an administrative order so that EPA and Carrier can obtain ready access to them if any question should arise about the activities of either Hill Bros. or the railroad at the site. By relying on the same records required to be kept in these other permits, the added burden on the railroad and Hill Bros. is minimal, though the record retention period should be extended to cover the entire period covered by their operations on the site, plus five years unless the railroad or Hill Bros. routinely turns over copies of these records to Carrier and EPA as they are created.

III. Administrative Order Requirements.

As we discussed in our July 14 conference, and as we have discussed in prior correspondence, EPA and Carrier both need binding and easily enforceable undertakings by the railroad and Hill Bros. to assure that the verbal assurances of compliance and cooperation given us at our outdoor meeting and in the conference will be honored in the future. This is especially important if personnel unfamiliar with the background of this matter take over.

The easiest and most dependable means to assure full compliance is to incorporate the necessary compliance assurances into an administrative order, whether an administrative order on consent (AOC) or a unilateral administrative order (UAO) issued by EPA to the railroad and Hill Bros.

In Carrier's view, any such AO should contain the following terms:

1. Forbidding interference with the ongoing site remediation work, including any damage to remedial equipment or monitoring wells, or interference with sampling or monitoring activities;

2. Specifying in detail a site construction and operations plan for the unloading work and forbidding material deviations from these plans without written authorization from EPA and Carrier;

3. Requiring compliance with stormwater permit requirements under section 402(p) of the Federal Clean Water Act and related requirements of Tennessee law;

4. Requiring compliance with air pollution control permit requirements under the federal Clean Air Act, 42 U.S.C. § 7401 et seq., (1988 & 1990 Supp.), and under Tennessee and local law;

5. Requiring both the railroad and Hill Bros. to post adequate EIL insurance, CGL insurance, automobile liability insurance, workman's compensation, employer's liability insurance, naming both Carrier and EPA as additional insured parties;

6. Requiring the railroad and Hill Bros. to fully indemnify EPA and Carrier against costs, claims or damages arising out of these parties' activities at the site.

7. Requiring the railroad and Hill Bros. to preserve the records required to be created and maintained by applicable air and water pollution permits, to provide copies at EPA's and/or Carrier's request, and to preserve such records for five years after completion of Hill Bros. and the railroad's work at the site;

8. Requiring the railroad, Hill Bros., and Carrier to provide EPA and one another five days' advance written notice of soil sampling in the spur area, including the proposed sampling and analytic methods, laboratories proposed for use, and the opportunity to observe the sampling and to split samples;

9. Forbidding the taking of groundwater samples without express written permission of both Carrier and EPA, given the need to maintain the aquitard intact at this site.

If EPA should choose to issue a UAO to the railroad and Hill Bros., it could simply be styled as an addendum to the February 11, 1993 UAO issued to Carrier. EPA has the authority

under sections 104 and 106 of CERCLA to prevent interference with ongoing remediation work. Without binding assurances of the kind outlined above, it is difficult to see how such interference can reliably be prevented. By the same token, issuance of such an order will give Hill Bros. and the railroad the same strong legal incentives to work carefully at this site and to assure that remediation proceeds without interference, disruption, or damage.

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Please let me know if you should have questions or wish to discuss this matter further. Until it is resolved, Carrier must continue to regard this matter and the railroad's lawsuit as an event of *force majeure*, excusing performance of the work provided in the UAO to the extent the railroad's continued lawsuit interferes with such work. So far, the railroad has shown no inclination to withdraw the lawsuit or to desist from its effort to rewrite the restrictions of EPA's administrative order in state court to suit its ever-changing plans for this site. EPA should be very reluctant to allow such blatant interference with the performance of what has until now been a successful remediation program, particularly if it expects in the future to obtain voluntary cooperation from parties conducting such cleanups at great expense.

Sincerely,

Russell V. Randle

Russell V. Randle
Counsel for Carrier Corporation

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Attachments